

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF HUMAN RIGHTS

State of Minnesota by
Kathryn R. Roberts, Acting Commissioner,
Department of Human Rights,

Complainant,

ORDER ON MOTION
FOR RECONSIDERATION

VS.

Independent School District No. 695,
Respondent.

The Complainant's Motion for Reconsideration in this matter came on for hearing before Jon L. Lunde, Administrative Law Judge, commencing at 9:30 a.m.

on Friday, April 12, 1985 at the Office of Administrative Hearings. Deborah J. Kohler, Helen G. Rubenstein, and Richard L. Varco, Jr., Special Assistant Attorneys General, 1100 Bremer Tower, 7th Place and Minnesota Street, St. Paul, Minnesota 55101, appeared on behalf of the above-named Complainant. John D. Kelly, Hanft, Fride, O'Brien, Harries & Bujold P.A., Attorneys at Law, 1200 Alworth Building, Duluth, Minnesota 55802, appeared on behalf of the above-named Respondent. At that time the parties were afforded an opportunity to present oral arguments on the Motion for Reconsideration filed by the Complainant on March 13, 1985.

Based upon the arguments of counsel, and upon all the files, records and proceedings herein;

IT IS HEREBY ORDERED: That the Administrative Law Judge's Order of February 28, 1985 is hereby amended as follows:

1. Instead of the back pay previously awarded, the Respondent shall pay to the Charging Party the sum of \$13,569.86, being 50% of the wages she would otherwise have earned from January 26, 1984 through February 28, 1985.

2. That in addition to back pay, the Respondent shall pay to the Charging Party, until her reinstatement, 50% of the monthly wage she would otherwise have earned from and after March 1, 1985, which said sums shall be payable monthly, at the end of each month. The first payment shall be made by April 30, 1985, and shall include the sums due for the months of March and April.

3. That the Respondent shall, in addition to the awards previously made, pay the Charging Party \$2,000.00 for the mental anguish and suffering she experienced as a result of the Respondent's failure to take timely and appropriate steps to investigate and resolve her complaints of sexual harrassment.

4. That in other respects the prior Order remains unchanged.

Dated this 16th day of April, 1985.

JON L LUNDE
Administrative Law Judge

MEMORANDUM

The Complainant argues that the relief initially awarded to the Charging Party is inadequate as a matter of law. The errors alleged fall into three general categories. First, the Complainant argues that the economic losses sustained by the Charging Party after October 1, 1983, were not due to her failure to make complete disclosure of the acts of harrassment occurring before that date. In its view, therefore, once the Respondent failed to take the timely and appropriate steps required of it under the Minnesota Human Rights Act, it became liable for all the damages sustained by the Charging Party after that date. Hence, the Complainant argues that all the Charging Party's economic losses and mental anguish after October 1, 1983 should be compensated. It argues that no reduction should be made as a result of her failure to make full disclosure of the acts of harrassment she experienced before that time.

Although the purpose of the Minnesota Human Rights Act is generally to make the Charging Party "whole", that general principle should not be followed here. Back pay, including the restoration of other economic benefits lost by an employee who has been the victim of discriminatory practices, is an equitable award authorized by the Minnesota Human Rights (Act). Back pay awards are not intended to punish an employer but are designed to compensate the victim of discrimination and to restore the earnings and other benefits which the victim would have received but for the unlawful employment practices of an employer. 2 Larson, Employment Discrimination sec. 55.31, p. 11-47 (1984). Generally speaking, in the usual discrimination case involving a discriminatory decision

to discharge an employee or the discriminatory refusal to hire an employee, there is only one cause for the employee's lost wages -- the employer's discriminatory actions. However, in this case the evidence shows that there was more than one cause for the Charging Party's economic losses. Applying a "but for" test, it is clear that the Charging Party may not have been constructively

discharged from her employment and suffered losses had the employer taken prompt and reasonable steps to investigate and correct the discriminatory acts she complained about. However, it is also fair to say that the Charging Party would not have sustained those losses if she had made full disclosure of the acts of harrassment that occurred. For that reason, the Administrative Law Judge is persuaded that it is inappropriate to make the Charging Party "whole". Her failure to make complete disclosure prior to October 1, 1983, coupled with her continuing failure to make a complete disclosure after that time, was a contributing cause of the economic losses she incurred. That fact should not be ignored in assessing damages in this case.

In the law of damages generally, cause is an essential element of an individual's right to relief. Where a party is partially responsible for the damages she sustains, full recovery is normally denied. Thus, full recovery may be denied on the basis of such common doctrines as contributory negligence or avoidable consequences. Similar doctrines are applicable under the Act. Thus, a charging party's wage loss will not be fully compensated if the charging party has failed to mitigate the damages sustained. The whole idea behind the doctrines limiting the amount of damages recoverable is that those damages flow from more than one cause. In this case, the Administrative Law Judge is persuaded that the Charging Party's economic loss was as much attributable to her failure to make full disclosure as it was to the employer's failure to make a full investigation. For that reason it is appropriate to reduce her damages by approximately 50%.

The Complainant argues that once the employer had enough information to trigger a responsibility to investigate, and once the Charging Party was constructively discharged, all the damages subsequently sustained must be reimbursed. That is not a persuasive argument here. The Administrative Law Judge is not persuaded that further meetings or investigations would necessarily have uncovered the acts the Charging Party was consistently unwilling to

disclose. moreover, her unwillingness to disclose the true nature of the harrassment she was forced to endure continued after October 1, 1983, and was a causal factor in her economic losses after that time. ?Men an employer is charged with vicarious liability based on the notice it had, its lack of notice of the heinous aspects of the harrassment the Charging Party endured must be considered in awarding damages.

The Complainant also argued that the Administrative Law Judge has no authority to apportion damages as he did. She argues that the apportionment made was illogical and that it was not authorized by the court's holding in Continental Can Co., Inc. V. State, 297 N.W.2d 241 (Minn. 1980). However, in that case the court noted (p. 251) that the award of damages is committed to the sound discretion of an Administrative Law Judge, and it sustained a reduction of a charging party's damages based on a causal analysis. Since the damages sustained by the charging party in that case were attributable to unpled racial discrimination and the activities of the charging party's husband, the court sustained a reduction in compensatory damages. The Complainant argues that the holding in that case is inapplicable here and that it should be narrowly construed to authorize a reduction in economic losses only when the damages

sustained are partially due to causes which are not illegal under the Act or which have not been properly pleaded under the Act. The Complainant argues that when the damages flow from one illegal act (i.e., a constructive discharge) then all damages subsequently incurred must be paid. Those arguments are not persuasive. The court's decision in Continental Can authorizes a consideration of causal factors. When the damages flow from causes which are both legal and illegal, damages can be reduced. Similarly, when the damages result from an illegal cause as well as from a failure to make full disclosure, damages may also be adjusted.

The Complainant also argued that if damages should be apportioned, the apportioning methodology used should be consistently followed so that the Charging Party receives an equal proportion of her lost wages, interest, sick leave and other forms of economic loss. That argument is more persuasive. Initially, the Charging Party was awarded 75% of her back pay and no front pay because the Administrative Law Judge believed that her reinstatement prior to the commencement of the 1985-1986 school year was unlikely. For that reason, awarding 75% of her lost wages through February 28, 1985 would give her approximately 50% of her wage loss up to the time of her reinstatement at the time of the commencement of the 1985-1986 school year. The ultimate award (approximately 50%) was also used in ordering reinstatement of some of the sick leave she used. Upon reconsideration, the Administrative Law Judge is persuaded that it would be better to clearly award the Charging Party 50% of the wage loss she sustained through February 28, 1985 or \$13,569.86. That figure is based on a total wage loss through February 28, 1985, of \$27,139.72. An adjustment to the total wage loss to that date was necessary because the Charging Party was paid on a 12-month basis rather than a 9-month basis as previously assumed. moreover, it is concluded, following the same methodology, that the Charging Party should receive front pay in the form of half of the salary she would otherwise have received, commencing on March 1, 1985 and running until her reinstatement. An award of front pay after that date and in the proportion mentioned, is a more consistent methodology and will act as an incentive for the employer to reinstate her at the earliest time practicable.

However, the Administrative Law Judge is not persuaded that interest should be paid on the back pay ordered because the Charging Party was awarded all of her out-of-pocket insurance costs. Those out-of-pocket costs should be fully reimbursed, and that full reimbursement justifies no award for interest on the back pay amounts ordered herein.

Finally, the Complainant has argued that the award of punitive damages to

the Charging Party, which was based, in part, upon the Respondent's disregard of the Charging Party's mental well-being, is inconsistent with the failure to award any damages for mental anguish and suffering. Moreover, the Complainant argues that the failure to award any damages for mental anguish and suffering is inconsistent with the apportionment methodology followed for other damages and ignores the fact that the Charging Party did have mental anguish and suffering after October 1, 1983, which remains uncompensated. That is a persuasive argument, and upon reconsideration the Administrative Law Judge concludes that the Charging Party should be awarded \$2,000.00 for the mental anguish and

suffering she incurred after October 1, 1983. This amount does not begin to approach the amount requested. However, the Administrative Law Judge is persuaded that the great bulk of the mental anguish and suffering sustained by the Charging Party resulted from Stocco's assaults upon her and not from the Respondent's failure to make a timely investigation of her complaints, and that the small amount of mental anguish and suffering she incurred as a result of the employer's failure to take more timely and appropriate action was attributable as much to her failure to make full disclosure of Stocco's acts as it was to the employer's failure to make a more timely and thorough investigation. Consequently, an award of \$2,000.00 is appropriate.

Finally, the Complainant argues that the Administrative Law Judge should have ordered Stocco's transfer to the elementary school. The Charging Party does have a disability which the School District is required to consider in making any necessary transfer decision. However, the record does not show that the Charging Party is unable to teach in a lower grade as a result of her disability. For that reason, while the District must consider the extent of her disability, the Administrative Law Judge remains persuaded that District personnel should have discretion, if it becomes necessary to make a transfer, whether to transfer Stocco or the Charging Party. If Stocco is discharged at the conclusion of pending dismissal proceedings, there will be no need to transfer the Charging Party. More importantly, if it becomes necessary to transfer one of them, the District must be left with discretion in this area. It must be able to determine what is in the best interests of its students. If it is forced to keep Stocco in its employment, the District must decide if he can safely teach grade levels below the fourth grade, or whether it would be safer for him to remain in the junior high school building. For example, the District may conclude that Stocco's sexual behavior constitutes a greater threat to children in the first through third grades than it does for children in the fourth grade. It may conclude that monitoring Stocco is easier in the junior high school than in the elementary school. Or it may decide, based on a number of other unknown factors which were not addressed during the hearing, that Silvestri's transfer is the most appropriate. Since no decision has yet been made, and since a complete record on the various factors the District may want or need to consider has not been developed, the Administrative Law Judge is persuaded that a particular order at this time would be inappropriate.

